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# Licenses and Access to Digital Content in Museums Pursuant to the New Directive on Information Re-use (2013): Prado, Louvre and N. Gallery

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## Abstract

Content digitization in museums, whose collections are offered as virtual galleries on the Internet, allows visitors and tourists to use a set of complementary services, also increasing the museum visibility beyond geographical barriers. Furthermore, new uses of images for personal and commercial purposes are being encouraged to boost the digital economy. The revision of the Directive on the re-use of public sector information (PSI) in 2013 will force museums - as well as libraries and public archives - to comply with the requirements in that matter. These obligations are primarily based on content availability, transparent access, license management, advertising of exclusive arrangements and, finally, non-discriminatory prices which may be higher than marginal costs. This study analyzes information re-use in three European museums (the Prado, Louvre and National Gallery) just when the Directive has been adopted by the European Union.

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## 1. Introduction

Digitization of works of art has become an essential activity to provide citizens knowledge of the physical collection in a virtual environment. Furthermore, digitization activities enable virtual services to be developed that help to contextualize the museum resources in their historical or natural environment. All such re-use activities also require financial effort by these cultural institutions, which are usually publicly owned.

In an international context of community initiatives which seek to boost the digital economy and turn the digitized cultural heritage into a source of wealth and employment (European Cultural Agenda), the new Directive 2013/37/EC on the re-use of public sector information has included the re-use of public cultural material in libraries, archives and museums. On the one hand, this paper is about the impact the European Directive

implementation may have on museums. On the other hand, some possibly complex aspects are discussed, such as exclusive arrangements and the use of materials that may be digitized during or after the agreement validity. An overview of the re-use of cultural information in three European museums (the Prado, Louvre and National Gallery) will also be provided.

When discussing the issue, it is important to consider that museums -and cultural heritage in general- have a dual function. Firstly, museums innovate and use new technologies in digitization activities, preservation, information management and geographic positioning. Moreover, they develop advanced techniques in different fields of knowledge: Archeology, History, Biology or Chemistry. Secondly, cultural heritage is a great source of creativity and innovation for the economic and social development of the OECD countries (KEA, 2009; Sostenuto, 2012 and Hutter, 2009). In particular, museums offer great innovation and the development of new services and techniques reveals better opportunities for the implementation of new digital products and experiences that allow visitors to enjoy new experiences in the coming years. However, exclusive agreements with private companies to re-use cultural heritage may limit access to publicly owned assets, cause excessive commercialization of such assets and - even worse- detract from the innovation value these cultural institutions have provided.

To conclude, distinctive features of digitization in museums, new experiences, virtual services, the Directive on the information re-use and proposals regarding exclusive agreements and prices are analyzed. Lastly, the paper ends with conclusions and proposals aimed at striking a balance between innovation and allowing citizens to enjoy the cultural heritage in museums.

## **2. Information re-use in museums, archives and libraries**

### *2.1. What is re-use of public cultural material?*

According to the general framework of the European Directives 2013/37/EC and 2003/98/EC, the re-use of public sector information is “the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced” (2003/98/EC).

Information re-use also includes many library tasks such as editing, printing, reproduction, digitization, redistribution, adaptation, downloading, summary, annotation, added-value information or licenses. A small number of main features can be deduced from re-use activities (Ramos and Arquero, 2012):

- Information re-use, whose purpose is rather different from that legally established, is not an activity carried out by public bodies; that is to say that the re-use of public sector information is carried out by legal entities or people who are not the holder of the public document.
- Public information can be processed in different ways. Information re-use may be a for-profit or non-profit activity, which fulfils social and welfare purposes or improves citizens' quality of life.
- Finally, the aim of Directive is to obtain added-value information products and services. In this context, public documents re-used by legal entities or people must be created with new purposes in the private sector.

The scope of Directive 2013/37/EC is one of the main novelties. According to this, it “should be extended to libraries, including university libraries, museums and archives” (2003/98/EC). Nevertheless, there are some important points, which define the re-use of public materials in these cultural institutions and they will be discussed in the next section.

### *2.2. Special features in the re-use of cultural heritage*

Special features in the re-use of public cultural material in libraries, museums and archives can be divided into four parts: transparency, charges, licenses and exclusive agreements.

- Transparency. New Directive 2013/37/EC notes that if libraries, archives or museums hold intellectual property rights to public cultural materials, these institutions will ensure their re-use for commercial or non-commercial purposes by using open and machine-readable formats and promoting transparency.
- Charges. There is a change in the new Directive regarding principles of this issue. While Directive 2003/98/EC allowed charges to exceed total costs, the new version limits the charges to the marginal costs incurred for their reproduction, provision and dissemination. In this point, the Directive 2013/37/EC notes that this principle will not be applied to public sector bodies which must "generate sufficient revenue to cover a substantial part of the costs relating to their collection, production, reproduction and dissemination" (Directive 2013/37/EC, art. 6.3) as well as libraries, archives and museums. This exception is subject to two conditions:
  - a) Firstly, implementation of objective, transparent and verifiable criteria.
  - b) Secondly, the total income from re-use activities "shall not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment" if the charge was stipulated by cultural institutions (Directive 2013/37/EC, art. 6.3). Cultural sector costs will be considered in this calculation and criteria should be public.
- Licenses. With regard to the licenses that set the re-use conditions, the new European Directive says that information can be re-used without conditions or with some licenses whose conditions neither should restrict the re-use activities nor restrict competition. In this regard, cultural institutions may establish a charge-based re-use or adopt an open data approach, which is the general policy to re-use documents in other sectors.
- Exclusive agreements. One important point of the cultural re-use refers to exclusive arrangements for commercial exploitation derived from cultural resources digitization. On regular basis, the period of validity of an exclusive right will not exceed ten years, however, some aspects are discussed below:
  - Exclusive agreements after the Directive 2013/37/EC endorsement:
    - These agreements, which are avoided, are an exception to the general principle.
    - If exclusive agreements are approved, they will be transparent as well as publicly known.
    - The period of validity of an exclusive agreement will not exceed ten years in the cultural sector. Should it do so, it must be reviewed in the eleventh and every seven years thereafter.
    - If there is a commercial exploitation right to digitize cultural resources, the agreement should include a free digital copy of the digitized resources that will be re-used once the exclusivity period has finished.
  - Exclusive agreements in force after the Directive 2013/37/EC endorsement: This point is confusing. It may refer to digitization agreements in force at libraries, archives and museums that do not include transparency principles. Moreover, these agreements do not include any mention of being publicly known and do not provide a copy of the digitized resources once the exclusivity period has finished. If so, these agreements "shall be terminated at the end of the contract or in any event not later than 18 July 2043" (Directive 2013/37/EC, art. 11.4).

### 3. Re-use of cultural materials in museums: a world of possibilities

If we focus on the digitization and implementation of new technologies in museums, it can be stated that there are many possibilities to re-use original materials. As may be seen below, these possibilities are divided into two groups: traditional digitization and complex formats.

- Traditional digitization: In this group, digitization formats as well as documents that are commonly used in museums are been taken into account. For instance, the cost of digitizing museums (Poole, 2012, p. 49):
  - Hi-resolution scans to support conservation and conditional assessment
  - Low-resolution images for delivery through online collection databases
  - Low-resolution images to illustrate records in Collection Management Systems

- Inclusion in catalogues and posters for the purposes of marketing and promotion
- Images of various resolutions for image licensing, retail and art-on-demand services
- Complex formats. In this group, a set of digital devices or applications that let citizens create new experiences and ways to visit museums are identified. In fact, most of them are outlined by Castilla (2012):
  - Three-dimensional reconstructions.
  - Virtual and augmented reality: virtual tours, reconstruction of architectural spaces...
  - Interactivity: Smart and multimedia guides for smartphones or tablets that may include audio, video, educational games...
  - Touch screens to seek works of art, access to catalogs, three-dimensional projection...
  - Interactive showcases and tables that allow users to access to multimedia information.
  - Tactile tools for virtual tours or interaction with real objects.
  - Audiovisual scenography tools, such as natural or historical reconstructions.

All these techniques are experimental and future developments may benefit the upcoming virtual visits in museums.

On average, if there is a large number of people whose experience using technologies is much more important and valuable than a traditional contemplative attitude, great development of complex formats is expected. As a result, these types of devices or applications should allow users to manage these resources (Castilla, 2012).

#### **4. Digitizing works of art in museums: distinctive features**

Digitization has become a routine in many cultural institutions in which commercial companies usually participate. According to some reports and studies, 11% of the European cultural heritage (Poole, 2010) was digitized in 2010. The scope of outstanding tasks is thus enormous, both in terms of required physical as well as financial resources.

A common definition of digitization includes a digital representation of analogue images, sounds or documents, encoded with a set of numerical parameters. Digitization also understood not to confer any rights to whoever performs the task as digitization involves a change to digital format; for example, we may convert a cassette tape to digital audio tape or scan a small number of pages of a book that is in public domain. In both cases, there is no original contribution, which amounts to a different work being created.

However, if we are referring to libraries, archives and museums, the digital processes of the cultural objects conclude that digitization is not an uniform process due to the quality of the digital object. Therefore, while “digitisation of published material in libraries is best characterised as a form of conversion or replacement (converting essentially the same material and content from one display/storage format to another without a significant loss of its cultural value, meaning or significance), in the case of museums and archives it is better characterised as surrogacy (the creation of a digital image and metadata which records and represents the original object, record or document)” (Poole, 2010, p. 11) which replaces the original object for promotion, access and conservation purposes.

Additionally, as museums are a smaller sector and less homogeneous than libraries, benefits of scale (large-scale workflows) in digitization processes cannot be obtained because of the range of shapes and size of objects.

With reference to their nature and size, museum objects are very different and conventional scanners, photographic equipment or special devices may be required for digitization. At the same time, museums may be interested in making high quality digital compositions to promote their services and products on the Internet. Thus, licenses and access to digital content in museums pose technical, economic and legal questions.

With regard to metadata sets, processes automation is not allowed in many cases and must be considered the most expensive and difficult activity if the museum wants to re-use cultural materials.

## 5. Rights derived from digitization

If 38,700 €bn is the estimated cost to digitize museum materials in the European Union (Poole, 2010), it is important to know the challenges of collection management so that cultural heritage is one of the main objectives in the Digital Agenda (European Commission, 2010).

In fact, copyright management is discussed in this section, although the problem affects both the rights of public domain works and the rights of works, which are still protected as well as digitized and re-used. According to some European Union documents (European Commission, 2008), this issue has not been sufficiently discussed and the principle of “keeping accessible public domain works after a format change” should be established. In other words, “the lawful user of a digital copy of a Public Domain work should be free to (re-) use, copy and modify the work” (Europeana Public Domain Charter, 2010).

Copyright management is considered to be such an important issue in libraries, archives and museums that it should be analyzed more precisely: “are copies of public domain items original?” (Hirtle, P.B., Hudson, E. y Kenyon, A.T. (2009, p. 34). The paper focuses on detecting the originality of copies of public domain works so they may obtain the same protection as an original work. If a copy processed by scanning is a technical procedure without creativity, photos may be arguable if the copies are considered “slavish copies”. Furthermore, two judicial examples are explained. In the first one, “photographs of three dimensional antiques were original works in which copyright subsists. The judge held that the selection of the item to be photographed, its positioning and lighting, the angle at which the photograph was taken and the focus that was used were matters of skill and judgment. Taken together, they could be sufficient to render the photograph an original work” (*Antiquesportfolio.com v. Rodney Fitch & Co* [2001] FSR 23, cit. Hirtle, 2009, p. 247). However, in the second example (“*Bridgeman Art Library v. Corel*”), the judge considered that “nor does changing the medium (from painting to transparencies or digital photographs) by itself generate the originality needed for copyright protection” (Hirtle, 2009, p. 34).

Over this point, defenders of public domain in the digital environment hold that “a mere mechanical reproduction of some other image, such as an unmodified photocopy or scan of a drawing, cannot attract additional copyright protection over and above that of the original, as it lacks originality: it is a bare copy, no more. That rule applies internationally and, on Commons, is normally taken for granted” (Wikimedia Commons). It is normally difficult to deny the creativity of three-dimension copies because their production “requires many creative decisions” and the result is a copyrighted original work. Very few people doubt that new technologies applied to museum activities exceed the creativity level required for copyright, which is also believed by the Wikimedia Foundation.

Briefly, researchers as well as citizens should remember that “the difference between a simple photographic reproduction (people, circumstances or objects) and the completion of an art work through photography” (Ramos-Simon, 1999) is an interesting debate, which highlights its artistic, testimonial and factual features. In this regard, it determines that can be included –or not- within the scope of copyright (Hughes, 2012).

Also, an important report commissioned by the French Government points out the consequences of digitization in the public domain (Rapport Lescure, France, 2013, p. 447, vol. I). On the one hand, some cultural institutions consider that “digital reproduction of public domain works produces a copyright which limits the reproduction and dissemination with the statement *Copyright: all rights reserved*”. On the other hand, the report highlights that case-law concerning the classification of photographs as original work is also fluctuating in France due to which some proposed measures of the French report suggest that legal protection of public domain should be strengthened through a positive definition that states reproductions of public domain works should also be included in the public domain. (Rapport Lescure p.452-454, vol. I) Furthermore, it may state that open access is compatible with commercial exploitation of the public domain.

Moreover, another interesting point is that embedding technical protection measures in digital files restricts their free use; thus “factual or technical exclusivity is replaced by a legal exclusivity” (Dussollier, 2010:49).

Undoubtedly, solutions must be found since the situation is so ambiguous in the international context that the digital management of thousands of cultural objects cannot depend on judges whose decisions may affect the

collection and differ from one to another country. A museum may thus have a digital collection with two-dimensional or three-dimensional objects and public communication activities. In line with this, the re-use must be subject to clear rules that let museums set transparency criteria, design licenses or reach agreements with other operators, which balance citizens' enjoyment and creativity.

## **6. European museums: Prado, Louvre and National Gallery**

In order to know the real situation of some European museums concerning the re-use of public materials, a questionnaire was sent to Museo Nacional del Prado (Madrid), Musée du Louvre (Paris) and the National Gallery (London). According to some scientific papers (European Commission, 2010) and other field works on cultural heritage, a poor understanding of the Directive (Curtis, 2011) and very few answers were expected. In this worrying situation, the questionnaire (six questions) was managed online and sent to many departments of these museums. Although the questionnaire was open for four weeks, further emails had to be sent. Finally, just only one response to the questionnaire was obtained. On the one hand, the Museo Nacional del Prado stated that the main commercial and dissemination activities are related to downloading digital data, selling digital document collections (custom-made), selling reproductions (printed, digital and three-dimensional resources), licenses for educational materials, licenses to use databases and licenses to exploit digitized collections.

On the other hand, more than 80% of the museum works have been digitized thanks to the equipment available in different departments (outsourcing and museum equipment) and less than 10% of the digitized collection has been made by or in collaboration with private sector, which do not have any advantage to access, use or sale those collections.

Finally, incomes coming from digitization activities are insignificant in relation to the total revenue of the museum. Results confirm there is a lack of interest because museums do not have specific departments for these activities.

## **7. Conclusions and recommendations**

Inclusion of museums, libraries and archives under the scope of Directive 2013/37/EC is a very wise decision as it allows these institutions to join the electronic information marketplace. Henceforth, these cultural institutions may operate under conditions of free transparency, implement an open data policy and benefit from public information management on the Internet.

Since there is no obligation to comply with this new Directive, cultural institutions may benefit from re-use activities, transparency and open access. Only in specific cases could these institutions implement some measures included in the Directive.

There is no awareness of the importance of the re-use activities as a result of the lack of interest shown by some museums to participate in the survey.

Endorsement of a specific regime for charges and exclusive agreements is negative for such institutions. These measures promote opacity, which is considered as a shortage of efficiency. Therefore, it does not benefit libraries, archives and museums as well as citizens, who may be deprived of creative cultural activities. Furthermore, these agreements promote lock-in practices, so managing copies returned by re-users on termination of the exclusive arrangement will be rather difficult.

Digital formats and the potential of 3D format are very new issues. Decisions made by museums should be based on experiences. The management team is recommended to adopt the best policy that matches with the museum circumstances and create a specific department to deal with these new challenges. Likewise, it is desirable for the best practices to be discussed.

The re-use challenges in museums are new and difficult to predict because technology evolves quickly. Thus, the possibility of exclusive arrangement terms being extended until 2043 is one it is difficult to understand.

From a legal point of view, a general policy should be adopted to define "public domain", stating that works derived from public domain should follow the copyleft principle so works do not lose their status in the public



domain. Nevertheless, the exception might be recognition of the authorship for works of high creative value.

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